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IN THE

Supreme Court of The United States

OCTOBER TERM, 1972

NO. 72-1040

COMMUNIST PARTY OF INDIANA, GUS HALL, JARVIS TYNER, SIMON BOORDA, JESSE REECE, MIKE BAYER, and RUTH NORRICK, Individually and on behalf of all other qualified voters similarly situated,

Appellants,

-v-

EDGAR D. WHITCOMB, Individually and as Governor of the State of Indiana; KARL J. STIPHER and THURMAN DE MOSS, Individually and as members of the Indiana State Election Board; and INDIANA STATE ELECTION BOARD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION

BRIEF OF APPELLEE

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the appeal in this case was timely filed.

2. Whether the requirement of Indiana law that a new political party file an affidavit that "it does not advocate the overthrow of local, state or national government by force or violence", is constitutional.

STATEMENT OF THE CASE

Indiana law requires that a group seeking a place on the ballot as a political party must file with the Election Board petitions bearing signatures of a prescribed number of registered voters along with a prescribed affidavit. The affidavit, signed by the officers of the party, must state that the party

> "does not advocate the overthrow of local, state or national government by force or violence, and that it is not affiliated with and does not cooperate with nor has any relation with any foreign government, or any political party, organization or group of individuals of any foreign government." Indiana Code of 1971 (I.C. 1971), 3-1-11-12.

Appellants (hereafter referred to as the Communists) tendered petitions but failed to tender the required affidavit. The Election Board therefore refused to accept the petitions. The Communists then filed suit, alleging the unconstitutionality of the affidavit requirement, in the United States District Court for the Northern District of Indiana, Hammond Division. The Complaint was filed on August 30, 1972, and an amended complaint was filed on September 8, 1972.

A three-judge court was convened pursuant to 28 U.S.C. §§2281 and 2284. A hearing was held on September 28, 1972, at which this case was consolidated for hearing and decision with the suits of two other groups which had been denied a place on the ballot for noncompliance with the affidavit requirement. These groups are the Indiana Peace and Freedom Party and the Indiana American Independent Party, Inc.

The District Court's Memorandum and Order was handed down that same day. The affidavit requirement

was held to be severable. The first portion, providing "that it does not advocate the overthrow of local, state or national government by force or violence," was held constitutional, while the remainder was held unconstitutional. The Election Board was ordered to accept from the Communists an affidavit meeting the requirements of the part of the statute held constitutional at any time prior to 2:00 P.M. on September 29, 1972. (Jur.Stat. pp. 2a-4a.) The Election Board, on September 29, 1972, presented a Verified Motion to Reconsider and for Stay to one of the judges of the three-judge District Court. The Motion was based on the failure of the District Court to consider, or to allow the Election Board to consider, the sufficiency of the signatures on the petitions. That Motion was then file-marked October 3, 1972.

An affidavit was filed by the Communists, but it was rejected as not in proper form because it attached a limiting definition on the term "advocate," (Jur.Stat. p. 8a) other than that prescribed by law or required by the three-judge panel. The Communists then filed with the District Court a Petition for Mandate to Enforce the Prior Order of the Court. That petition was denied on October 4, 1972, the District Court holding that the "Election Board acted in accordance with the precise wording of this court's order." (Jur.Stat. p. 5a.)

On October 10, 1972, the Communists filed both a Notice of Appeal and a Motion to Amend. (App. pp. 36-38.) On October 17, 1972, they filed a Motion to Withdraw Notice of Appeal. (App. p. 39.) On October 31, 1972, the District Court granted the Motion to Withdraw and denied the Motion to Amend. (Jur.Stat. p. 6a.) The Communists then filed a second Notice of Appeal on November 29, 1972. (Jur.Stat. p. 7a.)

SUMMARY OF ARGUMENT

The first Notice of Appeal filed by the Communists divested the District Court of jurisdiction over this cause. A simultaneous Motion to Amend destroyed the finality of the judgment so as to preclude an appeal. Logically, the result of the simultaneous filing of those pleadings is to declare both to be nullities.

A state has an interest in the protection of its political processes from fraudulent candidacies, and it is fraudulent for a group seeking the violent overthrow of democratic government to disguise itself as a legitimate political party. Loyalty oaths have never been held unconstitutional *per se*.

The Indiana statute is not vague or overbroad. The Communists attempt to limit the scope of a proper statute to overly narrow bounds to fit their views.

An alternate ground of decision would be the Communist Control Act of 1954 which further shows the fraudulent nature of the Communists' claim to be a political party.

ARGUMENT

I

TIMELINESS OF THE APPEAL

The Communists' argument as to the timeliness of the appeal concurs in the Election Board's position that this issue involves a complex factual situation and a lack of clear legal precedent. The cases relied upon in the Brief of Appellants are not on point. *Bowman v. Loperena,* 311 U.S. 262 (1940), would appear no longer to be an accurate statement of the law, since it predated the 1946 amendment to Fed. R. Civ. Pro., Rule 6(b), which amendment precluded the trial courts from granting an extension of time for filing a petition under Fed. R. Civ. Pro., Rules 52 and 59. Thus, the timeliness of the petition for rehearing was not a jurisdictional requirement at that time. See 5A *Moore's Federal Practice,* §52.11[3] at p. 2757.

Thompson v. Immigration and Naturalization Service, 375 U.S. 384 (1964) and *Wolfsohn v. Hankin,* 376 U.S. 203 (1964), are not on point. In each of those cases, the District Court took affirmative action which led the appellant to believe that his appeal would be timely. Here, the District Court merely denied without comment the Motion to Amend. That ruling may have been on the merits, but may also have been on the ground that the Motion was not properly filed. Such silence cannot be equated with the affirmative action in *Thompson* and *Wolfsohn.* Four Justices dissented in *Wolfsohn* on the basis that the case relied upon for authority in *Thompson* should be narrowly limited to its facts.

The other point as to this issue which requires comment is the effect of the Election Board's Verified Motion to Reconsider and for Stay, which was denied by the District court on October 4, 1972. That Motion is argued by the Communists to have been a Rule 52 and 59 motion, although no rule was cited in the text of the Verified Motion.

The time limitations involved must be considered. The District Court Memorandum and Order of September 28, 1972, allowed the Communists until 2:00 on September 29, 1972, to file a proper affidavit. The time limit for printing absentee ballots necessitated an immediate decision of the Election Board, which was to meet that afternoon. It was anticipated that an Emergency Application for Stay of Order would have to be filed with this Court, and such a pleading was actually filed. See *Whitcomb v. Communist Party*, — U.S. —, 93 S.Ct. 28 (No. A 370, 1972). That pleading, which was intended as a Motion for Stay, was of necessity drafted in approximately thirty minutes by three attorneys alternately dictating to a secretary. Some confusion would necessarily result from such a proceeding.

The Election Board's Motion to Dismiss presents to the court the question, apparently of first impression, of whether a pleading filed by a party is of any effect when an inconsistent pleading is filed simultaneously. The Notice of Appeal divested the District Court of jurisdiction over the cause. The Motion to Amend destroyed the finality of the judgment so as to preclude an appeal. The most logical result of such a situation is to declare both such pleadings to be nullities.

II

CONSTITUTIONALITY OF THE STATUTE

The Indiana Statute which is being challenged as unconstitutional is IC 1971, 3-1-11-12. The District Court found the "loyalty oath" provision therein to be severable and constitutional in part. That portion which was upheld requires that a group seeking a place on the ballot as a political party must file with the Election Board an affidavit, signed by the officers of the prospective party, that the party

> "does not advocate the overthrow of local, state or national government by force or violence."

The Communists contend that the requirement of a loyalty oath for placement on the ballot is unconstitutional *per se* in that everybody has a constitutional right to placement on the ballot. This court has noted, however, that:

> ". . . a state has an interest, if not a duty, to protect the integrity of its political processes from frivolous or *fraudulent* candidacies. *Jenness v. Fortson,* 403 U.S., at 442, 91 S.Ct. at 1976." *Bullock v. Carter,* 405 U.S. 134 at 147 (1972). (Emphasis added.)

It is fraudulent for a group seeking by violent revolution to overthrow our democratic form of government to disguise itself as a political party and use the very forms of the democracy it seeks to subvert in order to gain support and carry on its nefarious ends.

While this Court has considered many cases involving loyalty oaths and has held many of the particular statutes to be unconstitutional, never has this court held all loyalty oaths to be unconstitutional *per se.* Rather, this Court

has noted that a proper loyalty oath is a valid exercise of state authority. See *Lisker v. Kelley*, 315 F.Supp. 777 at 782 (M.D.Pa. 1970), affirmed 401 U.S. 928 (1971). It might be noted that *Lisker* and the case of *Gerende v. Board of Supervisors*, 341 U.S. 56 (1951), cited in *Lisker*, were cases upholding loyalty oaths required of political candidates.

The Communists contend that no oath beyond that of a successful candidate upon assuming office may be required. They also seek to differentiate between "positive" and "negative" oaths, whatever that distinction might be. Both of those arguments must fall in light of the decision of this Court in *Cole v. Richardson*, 405 U.S. 676 (1972). The oath under consideration there had two parts. The first was a requirement to uphold and defend the Constitution. That requirement was upheld as clearly analogous to oaths required by the Constitution itself.

The second part was a requirement to "oppose the overthrow of the government of the United States or of this Commonwealth by force, violence, or by any illegal or unconstitutional method." That clause was also upheld for the reason that it was merely the converse of the first and did not expand the obligation of the oath. It was pointed out that the oath did not require any affirmative action, but dealt with a state of mind. A part of the requirement to uphold and defend the Constitution is the requirement of opposing its overthrow by force or violence.

The issue which is then presented by this case is whether one may advocate that which he has the constitutional duty to oppose! It may be that, by means of some "verbal calisthenics" such a result may be reached, but this Court in *Cole v. Richardson* rejected such antics.

The Communists attack the Indiana statute as vague and overbroad. That attack centers upon the word "advocate," claiming the statute thereby proscribes protected speech. *Cole v. Richardson* also dealt with that issue. The emphasis of the Court there was not on any dictionary definitions of specific words, but on the tenor and intent of the language as a whole.

> "But such a literal approach to the second clause is inconsistent with the Court's approach to the 'support oaths.' * * * As Mr. Justice Harlan noted in his separate opinion in our earlier consideration of this case, '. . . almost any word or phrase may be rendered vague and ambiguous by dissection with a semantic scapel. [But such an approach] amounts to little more than verbal calisthenics.' " 92 S.Ct. at 1337.

The applicable standard is that of fair notice. *American Communication Association v. Douds,* 339 U.S. 382, 412 (1950). Such fair notice does not require absolute precision or that there be no possibility of misunderstanding.

> "The thrust of the argument is that these words are not sufficiently precise because they do not mean the same thing to all people, all the time, everywhere.
> This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. *Roth v. U.S.,* 354 U.S. 476, 491 (1957). See also *Miller v. California,* — U.S. —, 41 Law Week 4925 at 4929, fn. 10 (1973).

The term "advocate" does not include mere abstract speculation. The meaning of language in the statute should further be considered in light of past decisions of the Indiana courts in which the term has been in issue. The term "advocate" was considered by the Supreme Court of Indiana in *Butash v. State,* 212 Ind. 492 (1937). In that case a conviction for "advocating" and "inciting" the

overthrow of government was reversed on the grounds that the statements made were merely an expression of opinion or the suggestion of a possible remedy for a postulated problem.

> "Nowhere did he plead for the adoption of his theory, or defend them by argument. . . ." 212 Ind. at 498.

The Communists further seek to limit the term "advocate" to the scope allowable in criminal cases. Such a standard has been held inapplicable to a merely regulatory civil statute in *Communist Party v. Control Board,* 367 U.S. 1 at 56 (1961). Thus, the scope of regulation may vary with the nature of the statute involved. It would further be noted that the affidavit required under the statute refers to the official actions of the party itself thus reducing to a minimum any possibility of "innocent involvement" in activities which might be considered advocacy.

A final consideration is the provision of the Communist Control Act of 1954 which states that:

> "The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State . . . therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof . . ." 50 U.S.C. §842.

This statute is presented in support of the Election Board's position that the claim of the Communists to be a legitimate political party is fraudulent.

The statute would have to be considered an alternate basis of decision, since it is apparent that the District

Court did not rely on the statute in its opinion. Reliance on the statute would have precluded allowing the Communists to file an affidavit on September 29. (See Jur. Stat., p. 3a.)

The Communist Control Act was based upon a factual finding in the Subversive Activities Control Act of 1950 that the Communists were then engaged in illicit attempts to overthrow democracy, which situation was found still to exist six years later. *Communist Party v. Control Board, supra,* at pp. 4, 21 and 88. It may logically be inferred, at least in the absence of any showing to the contrary, that a state of facts which has existed for such a long period of time will continue indefinitely. The refusal of the Communists to file a proper affidavit that they do not advocate such unlawful activity would show that the situation today is still the same as when the Communist Control Act and Subversive Activities Control Act were passed.

The Communists argue that the Communist Control Act is a bill of attainder, citing *Blawis v. Bolin,* 41 Law Week 2617 (D. Ariz., 1973). In that case, though, part of the language of the statute, to-wit: "whose object or purpose is to overthrow the Government of the United States, or the government of any state . . . therein by force and violence," was omitted. The proper application of the statute, as shown in its application to the facts of this case herein, makes it clearly constitutional. Therefore, the Communist Control Act is a proper correlative of I.C. 1971, 3-1-11-12 and shows the necessity and propriety of the Indiana statute.

CONCLUSION

For the foregoing reasons, the Indiana State Election Board urges this Court to affirm the decision of the United States District Court for the Northern District of Indiana.

Respectfully submitted,

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